

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA,) CASE NO: 2:16-CR-00021-PP
)
 Plaintiff,) CRIMINAL
)
 vs.) Milwaukee, Wisconsin
)
 SAMY MOHAMMED HAMZEH,) Wednesday, January 31, 2018
)
 Defendant.) (10:14 a.m. to 11:14 a.m.)

STATUS CONFERENCE

BEFORE THE HONORABLE WILLIAM E. DUFFIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Courtroom Deputy:

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Transcribed by:

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361 949-2988

Proceedings recorded by electronic sound recording;
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(not present):**

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1 Milwaukee, Wisconsin; Wednesday, January 31, 2018; 10:14 a.m.

2 (Call to Order)

6 May I have the appearances, please, first by the
7 Government?

8 **MR. HAANSTAD:** Good morning, your Honor, Gregory
9 Haanstad and Paul Kanter for the United States.

10 MR. KANTER: Good morning, Judge.

11 | THE COURT: Good morning to you both.

12 **MR. ALBEE:** Good morning, your Honor, Craig Albee and
13 Joe Bugni appearing for Mr. Hamzeh.

14 THE COURT: Good morning to you both.

15 Well, as you can see, despite our best efforts,
16 Mr. Hamzeh is not here and we can't seem to track him down. So
17 we're going to go forward and I really just wanted to have this
18 talk about the motion for production of Brady material. I've
19 read what -- I've read the motion and the Government's response
20 and kind of distilled the request down to what I think
21 continues to be in dispute.

22 The Government's response to a large extent is some
23 version of, "We'll give it to you" or "We don't have anything"
24 or "We don't have anything beyond what we've already given you"
25 and that really is the response to a lot of their requests, at

1 least as I understand. The requests that I have kind of
2 identified that are still in dispute where the Government
3 admits that it has responsive material but doesn't want to turn
4 it over are the -- you know, the thought -- or what I want to
5 talk about today.

6 So starting with the first thing that I think is in
7 dispute, the Defense asks for -- let's go back. I think I
8 skipped one here. "All communications" -- it's under B of the
9 request. "All communications between each CHS and the FBI
10 agents" including Subsection 5, "all FBI notes and recordings
11 of meetings with the informants."

12 And as to that request, the Government's response is
13 that the agents have preserved rough notes that they used to
14 prepare reports but they ask that I either deny the Defendant's
15 request that the notes be disclosed or examine the notes in
16 camera and determine whether and to what extent they should be
17 disclosed, the theory being that according to the Government,
18 the Defendant is generally not entitled to an agent's notes if
19 the report contains all that was in the notes.

20 So let me start by asking. Mr. Albee, are we talking
21 -- is there any limit in the scope of notes you're looking for
22 either as to time period or subject matter or it's just all
23 notes of all agents that were involved in any aspect of this
24 investigation?

25 **MR. ALBEE:** If I could take a step back, Judge, about

1 some --

2 **THE COURT:** Sure.

3 **MR. ALBEE:** -- overarching concerns that I think
4 inform the discussion on a number of these points. One concern
5 I think we have overall is whether the U.S. Attorney's office
6 knows of everything that the FBI has. It seems that in many
7 cases, the response is, "The Government doesn't have that." I
8 don't know whether that refers to U.S. Attorney's office, to
9 the FBI, to all the agencies involved in this investigation but
10 it should.

11 And so we want to, I guess, at the conclusion of this
12 be clear on what the U.S. Attorney's office has talked to the
13 FBI about and knows whether they have or don't have.

14 **THE COURT:** Well, let's stop right there and ask the
15 -- Mr. Haanstad or Mr. Kanter. When these responses say, you
16 know, we don't have anything, are you referring to "we," the
17 U.S. Attorney's office or is it broader than that?

18 **MR. HAANSTAD:** It's broader than that. We're
19 referring to the prosecution team which includes our office and
20 the FBI.

21 **THE COURT:** Okay.

22 **MR. ALBEE:** And another -- and I appreciate that.
23 That's helpful. Another question is whether there are other
24 reports that are out there that we don't know about. One
25 frustration here is take an example of the surveillance reports

1 which we sort of belatedly reading between the lines thought,
2 it's clear that there's more surveillance going on here than
3 the reports we've received and we asked about them and then we
4 were told that there were a number of surveillance reports.

5 But it is a concern because we thought that they
6 should have been identified earlier and produced earlier and
7 even in the Government's response, there's talk about another
8 particular report being declassified about when the informants
9 were told that each other were on the Government's -- were
10 working for the Government.

11 So I do have concerns about what reports haven't been
12 identified here. I mean, I don't think this should be -- and
13 this goes to some of our specific requests, too. I hope that
14 answers are responsive to the spirit of what we're asking and
15 not gamesmanship as to whether we use the particular word or
16 phrase as to, you know, what exists out there.

17 So I guess we are interested in whether there are
18 other reports that, you know, the Government has not turned
19 over because it is an open-file policy, as I understand it, but
20 if they have other reports relative to this investigation, if
21 they don't want to turn them over, great, but I think we should
22 know about the reports. You know, then we can address those.
23 My concern is because there is this declassification process
24 that takes a couple months that if we learn about them on the
25 eve of trial, we're back to putting this off again.

1 **THE COURT:** So what specific request are you
2 referencing when you talk about that?

3 **MR. ALBEE:** I guess consistent with the open-file
4 policy for starters, whether there are other reports relating
5 to this investigation that have not been turned over.

6 **THE COURT:** Okay. So you want an answer to that. Is
7 that --

8 **MR. ALBEE:** That would be correct.

9 **THE COURT:** Okay. Can either of you answer that,
10 Mr. Haanstad or Mr. Kanter?

11 **MR. HAANSTAD:** Yeah, there's no gamesmanship going
12 on. We've disclosed the reports that we have. And I just want
13 to say with respect to the surveillance reports, we're not
14 disclosing them now because we've suddenly been convinced that
15 information in those reports is exculpatory or otherwise
16 disclosable. We're erring on the side of providing as much
17 information as we possibly can. So there were surveillance
18 reports with regard to 64 days' worth of surveillance and in
19 our view, there was nothing about those that required they be
20 disclosed under Brady, under Rule 16 or any other authority.

21 But because we've been given some additional time
22 before trial, our approach was, let's just have those reports
23 declassified and turn them over for whatever they're worth to
24 the Defense.

25 **THE COURT:** And when do you think that's going to

1 happen? How long -- when are we talking about?

2 **MR. HAANSTAD:** I think that we should have those
3 available -- I mean, I don't want -- this is a hard deadline
4 necessarily but I think by February 23rd.

5 **THE COURT:** Okay. All right, Mr. Albee?

6 **MR. ALBEE:** Okay. All right. I think we can delve
7 into the more -- the specific area the Court was addressing
8 although there was one item I did want to ask about that's in
9 -- and I'm going through the Government's response. I guess
10 it's -- it would be B2, all the text messages and there I
11 understand the Government will be disclosing the text messages
12 that they have but our request would also be for identification
13 of what was not preserved.

14 We had cited case law to the effect that the failure
15 to preserve texts between the Government and -- Government
16 agents and informants is problematic. In the case we cited, I
17 think it gave rise to an adverse inference jury instruction but
18 we did want to know whether there were additional text messages
19 that have not been preserved.

20 **THE COURT:** Okay. Was that -- and anybody want to
21 respond to that?

22 **MR. HAANSTAD:** So that's Request B2. That
23 information is available now. We can provide that by the end
24 of the week and those would be all text messages between the
25 confidential sources and the FBI. I have to say, when I

1 prepared our response, I went through just the Defendant's
2 checklist. So this question about what was not preserved, I'll
3 have to look into that.

4 **THE COURT:** Okay.

5 **MR. HAANSTAD:** But as to that B2, again, those text
6 messages that are requested there are available now.

7 **THE COURT:** You'll have to look into that to see if
8 there were text messages that were not preserved?

9 **MR. HAANSTAD:** Correct.

10 **THE COURT:** And if there were, do you have a position
11 about whether that information will be produced to the
12 Defendant and if so, by when?

13 **MR. HAANSTAD:** I don't have a position on it yet just
14 because I don't know what that looks like but I can look into
15 it quickly and report back.

16 **THE COURT:** Okay. Why don't you do that? That'd be
17 great.

18 **MR. HAANSTAD:** Okay.

19 **MR. ALBEE:** And then as to the rough notes question
20 that the Court had asked, I think the Government's right as a
21 general matter. Rough notes aren't automatically admissible as
22 statements is the case law but if there are -- if there's
23 information included in the rough notes that's not in the
24 actual report or there are any contradictions, then those are
25 statements of the witness and they're potentially Brady

1 material that does need to be turned over. The Government has
2 suggested the possibility of the Court reviewing these in
3 camera. Frankly, that seems a difficult burden for the Court
4 because there are --

5 **THE COURT:** Well, beyond that, my question for the
6 Government was going to be, how will I know -- if the basis for
7 not producing an agent's notes is that they're all -- all the
8 information in the notes is contained in reports, how will I
9 know if reports contain all that's in notes?

10 **MR. HAANSTAD:** We can provide both the notes and the
11 reports.

12 **THE COURT:** Okay. And what kind of -- what volume
13 are we talking about?

14 **(Counsel confer)**

15 **MR. HAANSTAD:** Yeah, I think the reports themselves
16 are that -- it's a small stack and, you know, I would guess --

17 **THE COURT:** Okay.

18 **MR. HAANSTAD:** -- around 200 pages and a lot of those
19 pages -- you know, from seeing reports before, there's a lot of
20 fluff in there, you know, headings and things like that. So
21 the actual text is significantly less than that 200 pages but
22 I'd say 200 pages worth of reports and then whatever the
23 corresponding number of pages of notes.

24 **THE COURT:** Okay. Mr. Albee?

25 **MR. ALBEE:** Well, I meant that's certainly, I guess,

1 an option. I don't know -- you know, I'm always a little
2 surprised on the rough notes, if they're all incorporated in
3 the reports. I don't see what the Government's -- you know,
4 where it burdens the Government or somehow undermines their
5 position to turn them over to the Defense and we can determine
6 whether it's all included. And the Court doesn't have to do
7 the work and we do. So that seems reasonable. It's also not
8 clear to me whether the prosecution has compared these and
9 determined whether there are any inconsistencies. So --

10 **THE COURT:** Well, let me ask -- let me -- again, I
11 apologize for keep jumping in but let me ask Mr. Haanstad.
12 What is the objection to the notes?

13 **MR. HAANSTAD:** Well, there --

14 **THE COURT:** Is there stuff in the notes that are --
15 well, I mean, if in theory everything that's in the notes is in
16 the reports --

17 **MR. HAANSTAD:** Right.

18 **THE COURT:** -- why not give the notes?

19 **MR. HAANSTAD:** A couple things. First of all, the
20 local rules specifically exempt rough notes from our discovery
21 obligations under Rule 16(a)(3). So we don't do it as a matter
22 of practice because we're acting consistent with the local
23 rule. But also in this particular case -- and I know we've
24 talked about declassification procedures before but I believe
25 that we'd have to go through declassification with respect to

1 not only the reports, which we've already done, which enable us
2 to disclose them to Defense. We'd have to do that with respect
3 to all of the rough notes as well.

4 **MR. ALBEE:** You know, that raises a separate concern,
5 Judge, in that it's certainly not unusual in my experience that
6 while rough notes weren't produced before trial, that something
7 happens at trial that necessitates the rough notes being
8 produced. I've had that happen and if we have this
9 declassification problem at trial, I don't know what we'd do
10 about it, is one issue. But I think it's essential that the --
11 one way or another the notes be compared to the reports and if
12 there's additional material and/or contradictions that all that
13 be turned over.

14 **THE COURT:** Okay. I'm not going to rule on this
15 stuff today. I'm just getting information that will help me
16 rule, by the way.

17 So let me ask you, Mr. Haanstad. What is the form of
18 the rough notes? Are these literally like I'm taking notes up
19 here? I mean --

20 **MR. HAANSTAD:** I'm not sure. I believe, yes.

21 **THE COURT:** Okay.

22 **MR. HAANSTAD:** I mean, they're handwritten. Just
23 handwritten notes, Judge.

24 **THE COURT:** Okay, all right. Anything else anybody
25 wants to add on that particular point?

1 **MR. ALBEE:** I -- and I don't -- if the Court did
2 review these in camera, I guess the other concern would be
3 there -- as we've indicated elsewhere, these are -- the reports
4 we have, at least, are heavily redacted. So I don't know
5 whether the Court would get unredacted reports so that it could
6 make those determinations.

7 **MR. HAANSTAD:** That will be the idea, is that the
8 Court would get unredacted reports.

9 **THE COURT:** Unredacted?

10 **MR. HAANSTAD:** Right. Which would --

11 **THE COURT:** Then how will I know --

12 **MR. HAANSTAD:** I'm sorry?

13 **THE COURT:** Well, let me ask. If I would get the --
14 you'd have to give me the unredacted and the redacted versions
15 I'm guessing because, I mean, I may look at the unredacted
16 reports and say, oh, yeah, everything from the notes is in here
17 but unbeknownst to me, some of that information has been
18 redacted in the version that went to Defense counsel. So --

19 **MR. HAANSTAD:** Right, that's correct and that plays
20 in a little bit to -- I'm sure you're getting to it but there
21 was also a request for unredacted reports.

22 **THE COURT:** Yes.

23 **MR. HAANSTAD:** Our response to that would be largely
24 the same, that is, we can provide the Court with both the
25 redacted and unredacted and the Court can make the

1 determination whether the reports need to be further redacted.
2 And there are some procedure questions that would go along with
3 that. It's not as though if you ordered with respect to either
4 of these categories the rough notes or the unredacted reports,
5 if you were to rule that there is information in there that's
6 disclosable or discoverable, there's some procedures in place,
7 declassification and things of that nature that we'd have to go
8 through before we provided those to Defense counsel.

9 **THE COURT:** Well, let me -- as long as we're on
10 unredacted reports, that was -- it's obviously one area that is
11 in dispute. Let me ask. What kind of reports are we talking
12 about, just to give me some idea?

13 **MR. HAANSTAD:** In terms of volume?

14 **THE COURT:** No, no, just -- I mean, what are the
15 reports that we're dealing with?

16 **MR. ALBEE:** In terms of what reports are redacted,
17 Judge?

18 **THE COURT:** Yeah.

19 **MR. ALBEE:** Yeah. And I'll let Mr. Bugni address the
20 redacted reports. Did the Court get our submission yesterday?

21 **THE COURT:** Yes.

22 **MR. ALBEE:** Yeah, okay.

23 **MR. BUGNI:** These are the confidential human -- or
24 the CHS reports and for us to be able to track exactly what
25 happened and what was said. You know, as we pointed out

1 yesterday and I hope you have the attachments, some of those
2 are heavily redacted. So you can't understand anything that
3 happened on that day. Yet those are pivotal days in the, you
4 know, genesis of what was happening in this case. And we only
5 chose five but there are numerous other ones where we have
6 large questions of, you know, what is in this report, what
7 happened, what was said. So for us to be able to make hay out
8 of these reports and be able to mount a defense or impeach a
9 witness, we need to have the unredacted reports.

10 **THE COURT:** How many reports are we talking about?

11 **MR. BUGNI:** Sixty-eight -- it may be, you know, may
12 be more.

13 **MR. ALBEE:** Sixty-five.

14 **MR. BUGNI:** Sixty-five. Sorry, your Honor. That
15 would also include the surveillance as well. Exhibit 1 to our
16 motion was actually some of the surveillance and that's heavily
17 redacted as well. So that would actually increase the number.
18 I imagine that would bring it to 129.

19 And, your Honor, there is also the witness reports
20 that are separate and those are also redacted and there's
21 identification numbers -- identification information in there
22 that's been redacted. Some of that we know -- we were able to
23 figure out but other ones -- you know, we shouldn't have to
24 guess.

25 **THE COURT:** I mean, is the Government's position that

1 the Defendant isn't going to get unredacted reports at any time
2 or just not yet?

3 **MR. HAANSTAD:** At any time if it's not further
4 redacted -- or further unredacted. There -- our position is
5 that nothing in those reports that's been redacted is
6 substantive. The redactions fall under a few main categories,
7 classification markings; administrative markings, things like
8 FBI case file number that's associated with this case; names of
9 some innocent third parties and personal identifying
10 information. That would be things like phone numbers, social
11 security numbers, driver's license numbers and addresses.

12 **THE COURT:** Okay, what else? Anything else?

13 **MR. HAANSTAD:** No.

14 **THE COURT:** Okay.

15 **MR. ALBEE:** Your Honor?

16 **THE COURT:** Yeah.

17 **MR. ALBEE:** If I could just -- if you look at CHS
18 Report 42 that we had filed yesterday, I mean, that entire
19 report is black. So it's beyond just an identification number
20 and a few administrative markings for us to be able to make out
21 exactly what was there. So that's the problem, is we agree
22 that, you know, there are going to be -- that the Government
23 has that view but when it comes to substance, there is a lot of
24 substance that has not been turned over and that we can't
25 discover.

1 **THE COURT:** Okay. Well, that one, it may be that I
2 would have to take a look at it and review it first.

3 Okay. Let me ask. One of the responses, I don't
4 understand it's in dispute because the Government's position is
5 that it doesn't have anything but I'm just looking at the
6 response to C, "All communications to or from Hamzeh that were
7 captured including emails, text messages, Facebook messaging"
8 and as to all those, the Government's response is it doesn't
9 have anything. And I guess the question there is, so the --
10 there's no emails to or from Hamzeh that were captured, no
11 Facebook messages, no text messages; is that right?

12 **(Counsel confer)**

13 **MR. HAANSTAD:** There were some things that would have
14 been responsive but we've already provided them. So there were
15 things -- one that comes to mind -- so there was a search that
16 was executed and we got some -- I think a laptop, a
17 PlayStation, things like that and a telephone. Those had this
18 type of information on it but it's already been provided to the
19 Defense.

20 **THE COURT:** Okay. The next one that I identified
21 that is in dispute is E, any policy manuals, guidance
22 memoranda, training manuals or other documents concerning
23 terrorist investigations and/or the use of confidential
24 sources, including Sub 1, those in effect at the time of this
25 investigation. And, again, the Government says, "We ask the

1 Court to either deny the request or examine the material in
2 camera to determine the -- whether and to what extent they
3 should be disclosed."

4 And, again, my question for you, Mr. Haanstad, is, as
5 I read that, how will I know whether what was done here -- my
6 understanding is that what the Defense -- and Mr. Albee or
7 Mr. Bugni, you can correct me. My understanding of what the
8 Defense is -- one thing they're trying to find out is, focus on
9 the confidential source component of that. You know, what are
10 agents trained as to what they're supposed to do as it relates
11 to the use of confidential sources and here, was that policy
12 followed? Did they act consistently with that policy?

13 And if you give me copies of the policies that I can
14 review it, how am I going to know if what they did here was
15 consistent with the policy? I don't know that I have that
16 level of detail about the investigation.

17 **MR. HAANSTAD:** I don't know that you would you be --
18 that you would have to make that level of finding or undertake
19 that level of analysis to determine whether or not it's at
20 least potentially --

21 **THE COURT:** Discoverable?

22 **MR. HAANSTAD:** Right. You know, and --

23 **THE COURT:** So you ask that I review it for what
24 purpose? What do you want me to do when I take a look at it?

25 **MR. HAANSTAD:** To determine whether anything in that

1 document, again, is potentially exculpable. And I should say
2 Document A. It's two -- principally two very thick manuals
3 which, you know, if there was maybe a -- maybe everybody would
4 benefit from an attempt to narrow this a little bit but I don't
5 know if the Defense has something specific in mind that they're
6 looking for but the case agents believe that it may be these
7 two manuals that he's talking about. I know there have been
8 requests before for documents that, for example, need to be
9 maintained under the Attorney General's guidelines for
10 confidential human sources. That's something that apparently
11 the Defense has already seen or been made aware of. I don't
12 know if there's something that they've seen or been made aware
13 of that they're trying to get at with this particular request
14 because the --

15 **THE COURT:** What are the two manuals you're
16 referencing?

17 **MR. HAANSTAD:** You know, I'm not sure what the titles
18 of them are.

19 **THE COURT:** Okay.

20 **MR. HAANSTAD:** But it would be -- I've heard
21 described by one of the case agents as basically something like
22 our Federal Criminal Code and Criminal Rules. I mean, turn
23 that over just to see, is there anything potentially helpful in
24 here which is something of a fishing expedition.

25 **MR. ALBEE:** Judge, one of them, my understanding, is

1 entitled, "The Attorney General's Guidelines regarding the use
2 of FBI confidential human sources." My recollection is we had
3 attached that to our discovery motion.

4 The version we have, I think, is about 50 -- roughly
5 50 pages or something like that and the -- we have this from
6 the Internet. I think I've seen versions that have been filed
7 in other cases. I understand this to be, I think, 2002 but,
8 again, part of our concern is we don't want to end up -- we
9 think there are contradictions between what the FBI did and
10 what the manual calls for. You know, one issue is we don't
11 want to be -- end up in trial and the -- and what they'll say
12 is, "Well, that's the old manual, I don't know what the new
13 manual says" or "You don't have the new manual," something like
14 that.

15 But we had also identified a number of portions of
16 that manual that we think are relevant and also relevant to
17 other discovery requests that we're making in our motion,
18 including -- this is at Page 12, "All FBI confidential human
19 sources must be subjected to the validation process as provided
20 in these guidelines and other FBI policies."

21 And it talks about a particular validation process
22 that takes place where they have to establish the person's true
23 identity; a photograph; their criminal history; whether they
24 might be subject of pending investigations; what their
25 motivation is for providing information or assistance, which we

1 think is very important, including any consideration they might
2 get for the assistance; promises or benefits; other information
3 required to be documented in the file. There are supposed to
4 be annual reviews. They're supposed to document -- the
5 informant is supposed to sign understandings of the rules and
6 so there's a signed receipt. So those are just some of the
7 things that are there.

8 There's another manual about the use of undercover
9 employees. There were some used in this case but that manual
10 also more specifically speaks to what must be done to avoid
11 entrapment and we think that there are some contradictions
12 between what was done here and what should be done to avoid
13 entrapment as laid out in that manual.

14 **THE COURT:** And where did you get these? You said
15 you got the first one off the Internet. Where's the second
16 manual? How do you have it?

17 **MR. ALBEE:** The second manual, I didn't bring that.
18 I think that was -- my recollection off the top of my head is
19 that it was filed in a Northern District of Illinois case
20 called *Daoud*, D-a-o-u-d, I think is where we found that one.
21 And then I don't know whether there are others including, you
22 know, these deal -- the two have identified deal generally with
23 confidential informants and undercover confidential employees
24 but I believe that there may be others that deal specifically
25 with terrorism investigations and things that might be done in

1 those cases.

2 But, again, I -- you know, I believe these to be used
3 in training of the FBI agents to establish the guidelines that
4 they're supposed to follow and, you know, we think that are
5 some -- both contradictions and also it exposes some other
6 information that we should have received in discovery.

7 **THE COURT:** Okay. Well, I -- I mean, it sounds like
8 you're aware of a couple specific manuals. Your request is
9 broader than that, of course, because you're -- you don't want
10 to be limited to those not knowing what other manuals are out
11 there. As to the two that he's aware of that he's just
12 referenced here in open court, the one specific issue he's
13 raised is, are these the latest versions or are there more
14 updated versions. Is there any way to answer that without
15 violating some confidentiality concern that the Government has?

16 **MR. HAANSTAD:** Yeah, I don't know. I mean, I can
17 look into it and see whether there are --

18 **THE COURT:** More updated versions?

19 **MR. HAANSTAD:** -- more updated versions and if so,
20 whether there's anything of concern in there when it comes to
21 disclosure.

22 **THE COURT:** Okay. Is your position that these
23 shouldn't be disclosed because they contain confidential
24 information or is it that, you know, you're just not certain
25 what he's looking for or what?

1 **MR. ALBEE:** It's a combination of both and this helps
2 to have some idea of what he's looking for in this type of
3 updated versions of these two manuals but what -- so I guess
4 I'm doing this sort as a balance. I don't know that it is
5 established that there's likely anything in those materials
6 that's exculpatory or otherwise disclosable and the same
7 question might be asked, well, why not just go ahead and
8 provide it but I don't know what's on the other side of that
9 balance when it comes to protecting FBI methods and things like
10 that.

11 **MR. SPEAKER:** Good. And -- you know, I --

12 **THE COURT:** If it had already been disclosed and at
13 least if some versions of prior iterations of these have
14 already been disclosed in other cases and they're public
15 records, it makes me wonder --

16 **MR. SPEAKER:** And I --

17 **MR. SPEAKER:** It also makes me wonder why -- I mean,
18 they're not exclusively within the control of the Government at
19 that point either if they're publicly available on the
20 Internet.

21 **MR. ALBEE:** Well, again, we want to know which ones
22 were governing these FBI agents at the time they were acting in
23 Mr. Hamzeh's case and from reviewing the ones we have, I mean,
24 these are hardly State secrets that are included here. I mean,
25 they're kind of common-sense law enforcement procedures that

1 you'd expect them to follow but, again, we think that they
2 haven't followed them and it's important to be able to identify
3 exactly what should be done in the case.

4 If there weren't prohibitions against subpoenaing the
5 Government -- I mean, this is the kind of thing if it was some
6 other organization. We'd use Rule 17(c) and just -- and get
7 these manuals. I can't imagine there's a confidentiality that
8 attaches to them but we can't do that. I do think they're
9 Brady material because there are some contradictions and I also
10 can't think of any reason why it's just in fairness not
11 provided to the Defense. I mean, we want our agents to follow
12 the rules.

13 **THE COURT:** I mean, I looked at this request and I
14 thought that you're seeking two very different things. When
15 you're seeking policy manuals, et cetera that concern terrorist
16 investigations, that's very different from confidential
17 sources, obviously, which are used in all kinds of
18 investigations other than terrorist investigations. And are
19 you looking for specifically confidential -- you know, policies
20 relating to the use of confidential sources in terrorist
21 investigations rather than all policy manuals regarding
22 terrorist investigations just generally?

23 **MR. ALBEE:** You know, and here's where I struggle
24 because of a lack of knowledge of what might be out there. You
25 know, I'm not looking for the manual that shows, you know, how

1 they're trying to find ISIS in Syria kind of -- you know, I
2 mean, that wouldn't seem to be relevant here but I would think
3 that there may be manuals in terms of doing stings domestically
4 that have guidelines. And so I think those would be important
5 and those are the kinds of things that we would be asked to be
6 produced.

7 **THE COURT:** So I guess my last question to you,
8 Mr. Albee, is there any narrower scope -- any way to narrow
9 down what you're looking for to get you specifically what you
10 want?

11 **MR. ALBEE:** It's -- I think I've identified the two
12 specific things that we're looking for and then really any
13 other manuals that were -- manuals, memoranda, what have you
14 that would have governed their conduct in this case. So I
15 think that's --

16 **THE COURT:** Would have or should have?

17 **MR. ALBEE:** That were applicable. I'm not sure I
18 know where the would have and should have -- it's kind of --

19 **THE COURT:** Well, the would have, I guess, is the,
20 you know, actually bolded out and used it in their discussions
21 with their confidential sources versus --

22 **MR. ALBEE:** Yeah, I think it should have, that -- you
23 know, that it was applicable to this setting. So I'm not
24 asking for, again, terrorism that has -- it's so far afield
25 from what the investigation that was going on here is but I

1 think that the agents would be able to identify that there are
2 manuals -- if there is one, for example, relating to terrorism
3 stings, that's clearly relevant to what they should have been
4 doing in this case and we're asking for that.

5 **THE COURT:** Okay. Well, the last request that I
6 interpreted as truly in dispute was the request for H. H
7 requested identification of any payments or benefits whether or
8 not memorialized in writing given to the informants in this
9 case or in any other case for working as an informant,
10 including -- and then it's Subsection 6, specification of all
11 the cases in which the informant has assisted the Government
12 along with identification of benefits.

13 In response, the Government identifies that one of
14 the CHS's, CHS2, was previously a source. They say when and
15 then ultimately they say, and he continues to cooperate. But
16 they don't want to provide the specific cases in which CHS2 has
17 provided assistance.

18 So I'll start with you, Mr. Albee. Why do you need
19 to know the specific cases, some of which may be ongoing
20 investigations?

21 **MR. ALBEE:** What we'd be looking for is what are the
22 possible biases of these informants and if they're working in
23 other cases and getting paid in other cases and presumably want
24 to keep being paid in other cases, they need to curry favor
25 with the Government. So --

1 **THE COURT:** Why do you need to know the names of the
2 cases or the specific cases?

3 **MR. ALBEE:** And I -- what I'm pondering is I could
4 see it's possible that a redacted version might be adequate or
5 it might not. I guess if I received at least initially some
6 description of what they were doing and being paid. Part of it
7 is determine whether the payment is commensurate with what they
8 were doing or that they were getting extra monies. Again, it's
9 kind of the level of potential need to curry favor with the
10 Government. Also, it'd be important to know whether there were
11 any violations in any of those other cases.

12 If we had the names of the cases, certainly it would
13 allow us to determine whether there was -- potentially
14 investigate whether there was other dishonesty in that case,
15 whether they reported things that didn't pan out.

16 **THE COURT:** I mean, but that was one reaction I had.
17 It was, geez, all of a sudden, you're going to open up -- this
18 up to -- you're going to have another trial about another case
19 and there's going to be a dispute about -- I mean, it opens --

20 **MR. ALBEE:** Well, and, again --

21 **THE COURT:** -- up discovery in a completely different
22 case.

23 **MR. ALBEE:** Well -- and the Brady material, Judge,
24 doesn't -- is broader than what's admissible in court. So the
25 Court may have identified something valid in terms of if the

1 Court was deciding what we could use during cross examination.
2 I don't know without knowing about it but it is something that
3 certainly could lead to favorable evidence from investigation
4 and it exposes bias on behalf of the informants. So that's why
5 we'd be looking for the other cases and certainly what's been
6 paid in the other cases.

7 Going back to what I was quoting from the CHS manual,
8 their initial -- when they first sign up -- and it looks like
9 this CHS2 worked as an informant in 2011 and then he joined up
10 again in April 2015. Those should be two occasions, at least,
11 where they identified what their motivation was for getting
12 involved as an informant and I think that would be important as
13 to bias but we don't have those kinds of things. So it would
14 be in their file according to the guidelines.

15 **THE COURT:** And, Mr. Haanstad, what's the
16 Government's objection to producing that information?

17 **MR. HAANSTAD:** Well, as he noted, it has the
18 potential of -- the reason he was requesting information about
19 ongoing investigations and if it were narrowed, there might be
20 some ways that we could respond. For example -- and I'll
21 double-check this but my understanding is there were no
22 violations or any indication of dishonesty with regard to this
23 informant's prior and subsequent cooperation, that is, the
24 cooperation he provided prior to becoming involved in the
25 Hamzeh investigation or after his involvement in that

1 investigation.

2 Payments, I could check on them. One falls outside
3 the scope. There's a payment, for example, that's identified
4 in H1 of the Government's response. That payment was made on
5 February 25th of 2016. We identified that because even though
6 it took place after Mr. Hamzeh's arrest, it was basically --
7 money was provided so that Mr. -- or so that the informant
8 could get a new telephone.

9 I could check to see whether there's a record of
10 other payments but, again, we provided everything that the
11 Defendants -- oh, I'm sorry -- that the informants were paid
12 with respect to this -- not just during the timeframe of this
13 investigation but also with respect to this investigation which
14 I think is the material that would arguably potentially be
15 usable in cross examination of those witnesses.

16 **THE COURT:** So, Mr. Albee, when you ask for a
17 specification of other cases in which the informant has
18 assisted the Government along with identification of benefits,
19 "benefits" meaning?

20 **MR. ALBEE:** Benefits, anything. I mean, it could be
21 expenses, payments, immigration consequences, not charging in a
22 crime, all those kind of things. They're all reasons for them
23 to be biased in favor of the Government or to fear the
24 Government and so I think they'd all be relevant here, any
25 benefits that they receive from the Government, including in

1 other cases. If these -- it seems to indicate that the
2 informant continues to work for the Government. Again, if
3 there's -- if he's being paid in that case, he has reason to
4 continue to do what they want and say what they want because
5 that's his usefulness to them and he knows that. And so we can
6 expose that bias if we're aware that he's being paid.

7 **THE COURT:** And from the Government's perspective,
8 other than the concern about the fact that informants may be,
9 you know, currently, you know, working on cases that are
10 ongoing, does it have the -- is it -- would it be willing to
11 provide the information that Mr. Albee is looking for for
12 investigations in cases that are closed?

13 **MR. HAANSTAD:** I think that we provided all of that.
14 I -- we can talk with the FBI again to make sure that that's
15 the case but that's my understanding, is we provided all that
16 information.

17 **THE COURT:** Okay. Well, these -- those were the four
18 categories of documents that I read as continuing to be in
19 dispute. Everything else is either under one of the other
20 categories of it's already been produced or the Government
21 doesn't have anything.

22 Mr. Albee, is there anything else that you think is
23 still in dispute?

24 **MR. ALBEE:** Judge, if we could continue for a moment
25 related to the subject we were just talking about, about

1 payments. The information disclosed about other cases doesn't
2 say anything about whether there were any benefits received or
3 requested and so we -- as I've explained, we think that stuff
4 is all relevant to bias. I note in the CHS guidelines that
5 we'd also ask for the specific documents showing, I received
6 this money on this date from, you know, whatever kind of
7 document shows the receipt, a breakdown of expenses, those
8 kinds of things. So we have a list that says he was paid
9 \$2,000 on X date but we don't have any document.

10 The -- we have cited in our motion a Second Circuit
11 case, *Gill*, where it talks about those kind of documents as
12 being exculpatory because they're admissible in whole or part
13 that they could "lead to admissible evidence" or would "be an
14 effective tool in disciplining witnesses during cross
15 examination by refreshment of recollection or otherwise." And
16 that's why we need them because this is not an admissible or
17 usable document, what the Government gave us, but if we have
18 the receipt for \$2,000 or what have you, it may be used in
19 cross examination of the informant and/or the agents.

20 The Government characterizes some of what was
21 received. Let me see if I can find this spot. They
22 characterize some of the payments as being expenses. It
23 says --

24 **THE COURT:** The total expense.

25 **MR. ALBEE:** Well, no -- and, yes, that's one but as

1 to the CHS2, it says he was using his personal vehicle and
2 paying for gas and telephone because it was to his financial
3 detriment, they made the following payments. So their
4 suggestion is, you know, they came up with some ballpark figure
5 and came up with the following payments. But what the
6 guidelines require is that the FBI's reimbursement of expenses
7 -- this is at Page 28. The FBI's reimbursement of expenses
8 incurred by a confidential human source shall be based upon
9 actual expenses incurred. So, you know, that, again, is a
10 potential discrepancy between what the policy requires --

11 **THE COURT:** Does it -- it doesn't sound -- what you
12 just read doesn't say they need receipts.

13 **MR. ALBEE:** No, but actual expenses were incurred and
14 I see that the payments are 750, 550, 2,000, 2,000. They
15 don't --

16 **THE COURT:** They're round numbers.

17 **MR. ALBEE:** -- those don't sound like, you know,
18 here's my gas bill. It happens to be \$750 or something like
19 that. It also sounds far -- because these people never left
20 Milwaukee as far as I know, it also sounds like a lot of gas
21 money. So that doesn't seem to jive. And --

22 **THE COURT:** What --

23 **MR. ALBEE:** -- so that's why we'd be looking for the
24 specifics.

25 **THE COURT:** So what documentation exists to back up

1 the payments that are referenced on Page 5 of your response?

2 **MR. HAANSTAD:** You know, the information that we
3 provided -- first of all, I thought that -- our view was that
4 was substantively what was required, that is, the date of
5 payments, amount of payments and purpose of payments. We
6 pulled the numbers obviously from some underlying documents.
7 Again, that's a category that I indicated we could make those
8 receipts and other paperwork available to the Court and see if
9 it's anything additional that would be disclosable beyond,
10 again, payment amount, payment date and payment purpose. So I
11 would put that in the category of also these other documents
12 that we'd be willing to provide to the Court for its in-camera
13 review.

14 **THE COURT:** I appreciate all this documentation that
15 you're going to be giving.

16 **MR. ALBEE:** And, Judge, one thing, again, is the
17 Second Circuit characterized it, disciplining the witness but,
18 you know, what guidelines provide for is that there's this
19 issue of paying taxes on this money, that there should be
20 documents notifying the informant that he has to pay taxes on
21 the money. We don't have any indication whether he did pay
22 taxes on the money. I know that that witness also -- while I
23 don't think there's a formal order, he should be paying child
24 support and at the very least, there's a question of whether
25 things are concealed from his ex-wife in terms of not paying

1 for that child's expenses.

2 So, you know, there are a number of reasons why the
3 underlying documents would be important in this case and would
4 be Brady material.

5 **THE COURT:** Okay. Is there anything else you want to
6 raise?

7 (Counsel confer)

8 **MR. ALBEE:** If we could have just one moment, Judge,
9 so we just --

10 **THE COURT:** Sure.

11 **MR. ALBEE:** Judge, the -- one major concern I have in
12 this case is -- well, I guess this relates to two different
13 parts of our request. According to the response of the
14 Government the agents gave the informants for discrete pieces
15 of advice about what they could or could not do in this case as
16 informants, those strike me as woefully deficient if that's all
17 they told them. And if that's what it is, that's fine but the
18 concern is that something extra will show up at the time of
19 trial and agents will be saying, oh, yeah, well, we told them
20 that, too. We told them not to do this because that would
21 create a danger of entrapment or we told them not to do X, Y or
22 Z.

23 So I have grave concerns that that's not complete and
24 there should be a -- there should be some sort of order that
25 the instructions that were given to the informants be produced

1 so that we have the order and can ask for its enforcement when
2 we get to trial.

3 Similarly, it's -- I just can't imagine -- we've
4 asked for information about conversations between agents and
5 informants about when machine guns came up or when the Masons
6 came up because there's nothing in the reports as to any
7 directions that were given, like, you know, why don't you see
8 if he'll get a machine gun or whether this was just a rogue
9 informant who decided on his own what course this would take
10 and whether he'd push machine guns or push the Masons or what
11 have you.

12 There had to have been discussions at different times
13 reporting or alerting them to the fact that this was what the
14 informant was going to try to get Mr. Hamzeh interested in.
15 And I just -- it's just incomprehensible to me that there's not
16 some documentation of what discussions took place at those
17 times and what's exculpatory -- you know, so all that's fine
18 and it can be incomprehensible to me but what becomes
19 exculpatory is that if I'm -- just to pick something.

20 On January 5th, they talked about the Masons -- the
21 Government and the informant -- or the informant mentioned
22 something about it or sometime earlier he mentioned guns and
23 then it later came up in discussions with the Mr. Hamzeh. That
24 shows the Government introducing the subject which is
25 exculpatory because it's a consideration under entrapment law

1 as to who introduced it and so the fact that it was discussed
2 before a certain time supports our claims.

3 And so I just -- at some stage of this, there must
4 have been conversations between informants and agents about
5 Masons or machine guns and there's no indication that there is.
6 So we are --

7 **THE COURT:** So what are you asking?

8 **MR. ALBEE:** So we're asking that that be, I guess,
9 specifically ordered. I can't do anything if the Government
10 claims that it --

11 **THE COURT:** That what be ordered?

12 **MR. ALBEE:** That the Government produce all
13 information about discussions between the informants and agents
14 about the Masons and/or about machine guns, whether documented
15 in written form or not.

16 **THE COURT:** Has that been requested? Does that fall
17 within the scope of one of these specific requests?

18 **MR. ALBEE:** Um --

19 **THE COURT:** Or are you asking it anew right now?

20 **MR. ALBEE:** -- well, I have in front of me, Judge, at
21 Page 7 of the Government's response, it's L. And so I presume
22 there's parity in what we had asked for but rather than look
23 for mine -- it says, "All reports, memoranda, rough notes, text
24 messages or any other form of communication." So it's any
25 other form of communication.

1 And, again, Judge, if I don't specifically ask for
2 it, it doesn't mean it's not very -- I'm alerting the Court and
3 the Government that any of these -- any conversations between
4 agents and informants about the Masons or guns that we don't
5 have is Brady material because it shows that the Government
6 initiated it rather than Hamzeh. That's my position and my
7 theory on that and so if that happened, regardless of whether
8 an agent put it on a piece of paper, they need to tell the
9 Government about it and they need to tell us.

10 **THE COURT:** Okay. Mr. Haanstad, any response?

11 **MR. HAANSTAD:** Just that we've already disclosed
12 everything that's -- that would be responsive to that. There's
13 -- we've disclosed the reports. We've dealt today with the
14 issue of rough notes, text messages. So, again, we have
15 nothing further responsive to that.

16 **THE COURT:** Okay. And Mr. -- what I heard Mr. Albee
17 saying is that in addition to physical documents that may exist
18 and kind of independent of this request for the production of
19 the documents, if agents did talk to confidential sources or to
20 these informants about introducing the concept of machine guns
21 or Masons that even if there are no documents that exist to
22 evidence that conversation, he needs -- he wants to be informed
23 about it because he thinks it's Brady material. So, I mean, I
24 guess that is what it is but there's nothing that is being
25 requested of me.

1 **MR. HAANSTAD:** Right.

2 **MR. ALBEE:** Well, I would ask for -- when the Court
3 reviews this, ask for an order along the lines of what I
4 specifically requested and I won't repeat the arguments. It's
5 at Page 24 and 25 where I discuss why our -- why we think
6 that's exculpatory and what we think should be there.

7 **THE COURT:** I mean, I can order it but their position
8 is they've already produced it. So I don't know what I'm
9 ordering.

10 **MR. ALBEE:** Going back to, I think, my initial
11 comments, I worry about communication between all the FBI
12 agents and the Government. Sometimes things don't get to the
13 prosecutors.

14 **THE COURT:** So you're saying you're just not sure
15 when they say they've already given it that they really have
16 already given it?

17 **MR. ALBEE:** Well, again, they would get the -- they
18 would get whatever is in written form but if -- they might not
19 know that an agent had such a discussion with an informant. I
20 mean, I -- it's just it's a concern because it's exculpatory
21 and we should be given it and maybe it doesn't exist but if it
22 happened, it doesn't mean that it was documented and it's just,
23 I think, so important that --

24 **THE COURT:** So when you're saying, "I should be given
25 it," you mean given the information, not the document?

1 **MR. ALBEE:** That's right.

2 **THE COURT:** Given the information --

3 **MR. ALBEE:** If there's a document, great, but
4 otherwise, I'm entitled to the information even if it's not
5 documented, yeah.

6 **THE COURT:** Okay. Anything else?

7 **MR. ALBEE:** Yeah, there's one other thing. We also
8 ask for the mental health records. The Government says it's
9 not in possession and, again, acknowledges that some should
10 exists and it also sounds like -- I can't remember what the
11 word is but that an agent was perhaps the person who checked in
12 the informant into the hospital and maybe had been some sort of
13 point of contact. So it seems to me that there may be have
14 been a consent filled out at that time and that these mental
15 health records are available to the Government. Otherwise I
16 suppose we subpoena those for in-camera review because those
17 would seem to be exculpatory, that there was a hospitalization
18 soon after the arrest in this case.

19 **THE COURT:** Which request is that?

20 **MR. ALBEE:** I'm looking at the Government's response,
21 Page 9P. Ours --

22 **THE COURT:** Okay. And, again, they say they don't
23 have anything. So your position is what?

24 **MR. ALBEE:** Well, so I think that they -- one
25 question is, did they receive a consent to obtain those

1 records, in which case I think they should -- then they have
2 access to them and they can turn them over. Beyond that, I
3 guess the next step would be to try to subpoena them for
4 in-camera review because I believe them to be exculpatory but
5 because it appeared that somebody -- that an agent may have
6 been with the informant when he checked into the mental health
7 facility, there may have been some sort of consent given at
8 that time giving them access to the exculpatory information.

9 **THE COURT:** Okay. Any response you want to make,
10 Mr. Haanstad?

11 **MR. HAANSTAD:** Again, we don't have any mental health
12 records. I'm not sure that we could obtain them if we tried
13 to. I'm not aware of any -- and I'm not aware of any consent
14 that was signed that would give us the authority to obtain a
15 confidential source's mental health records.

16 **THE COURT:** Okay. Well, I guess before -- I mean,
17 there's a couple of things that the Government indicated it
18 wanted to follow up on, I guess. Do you want to have some
19 opportunity to supplement your response and if so, how much
20 time do you need?

21 **MR. HAANSTAD:** I don't think it would take long.
22 There aren't many responses. They're pretty easy to look into.
23 Maybe just the end of next week, next Friday.

24 **THE COURT:** Okay, that's fine with me. And, you
25 know, address anything that was discussed here today that you

1 think you can --

2 **MR. HAANSTAD:** Sure.

3 **THE COURT:** -- help narrow or further refine before I
4 say, give me everything to take a look at so that I don't have
5 to do that. That would be even better.

6 And I guess, Mr. Albee, is there any reason for you
7 to respond to anything that they supplement with?

8 **MR. ALBEE:** It's obviously hard to predict what would
9 be in that response. I guess we'd like an opportunity to
10 submit a reply. We won't try to belabor any points.

11 **THE COURT:** Okay. Try hard.

12 **MR. ALBEE:** Okay.

13 **THE COURT:** So the Government's response -- or
14 supplemental response will be due on February 9th.

15 **MR. HAANSTAD:** Okay.

16 **THE COURT:** And then, Mr. Albee, time to reply, do
17 you need a week? Do you need less?

18 **MR. ALBEE:** A week would be great.

19 **THE COURT:** I guess under the circumstances, that's
20 fine. February 16th. And then once we get that, we'll tackle
21 what remains in dispute and issue an order. Okay?

22 **MR. ALBEE:** All right, thank you.

23 **THE COURT:** Thanks, everybody.

24 **MR. HAANSTAD:** Thank you, Judge.

25 **THE CLERK:** All rise.

(This proceeding adjourned at 11:14 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



April 16, 2018

TONI HUDSON, TRANSCRIBER